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No. 95-1493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUSAN L. RICHARDSON,
Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Of the three questions listed by petitioner, the only one actually presented in this case is the third question listed in the petition, which respondent would suggest rephrasing as follows:

> Does the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, include charges by a national bank for the failure of a borrower to make timely payment of amounts due on credit card accounts?

Petitioner's first two questions are not presented. The Colorado Supreme Court did not hold, and no party contends, that the South Dakota legislature has the power to define the term "interest" as used in section 85 of the National Bank Act, 12 U.S.C. § 85. *See* discussion *infra* pp. 5-6.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Citibank (South Dakota), N.A. states that it is a wholly owned subsidiary of Citicorp Holdings, Inc., which is a wholly owned subsidiary of Citicorp.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported as *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. 1995) (Petitioner's Appendix ("Pet. App.") at 1-5). The order and opinion of the trial court (Pet. App. at 9-22) are not reported.

JURISDICTION

The Colorado Supreme Court entered its judgment on December 18, 1995. The petition was filed on March 18,

1996, and docketed on March 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is set out at page 2 of the petition.

Section 85 of the National Bank Act, 12 U.S.C. § 85, is set out, in relevant part, at page 3 of the petition.

Section 86 of the National Bank Act, 12 U.S.C. § 86, is set out, in relevant part, at page 3 of the petition.

Section 54-3-1 of the South Dakota Codified Laws is set out at page 4 of the petition.

Section 54-3-1.1 of the South Dakota Codified Laws is set out at pages 4-5 of the petition.

The Colorado Uniform Consumer Credit Code provision that governs late charges, Colo. Rev. Stat. § 5-3-203 (1992), is set out at page 4 of the petition.

STATEMENT

Introduction

The question presented by this case is already pending before the Court in *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (No. 95-860), which has been fully briefed and is scheduled for argument on April 24, 1996. There is thus no reason for the Court to grant this petition now; the case can simply be held for the decision in *Smiley*.

This is one of many purported class action lawsuits filed in courts around the country against respondent Citibank (South Dakota), N.A. ("Citibank") and other banks challenging late payment fees charged pursuant to credit card agreements entered into with credit cardholders. These lawsuits have led to a conflict between the

highest courts of different states on an important question of federal law: whether the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees. The decision of the Colorado Supreme Court (Mullarkey, J.) from which petitioner seeks review is consistent with recent decisions of the California Supreme Court, *Smiley, supra*, and the United States Court of Appeals for the First Circuit, *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993). Those decisions are also in harmony with the interpretation of section 85 on this point by the Office of the Comptroller of the Currency (the "OCC"), which charters and supervises national banks, including Citibank. A recent decision by the New Jersey Supreme Court, however, directly conflicts with this authority. *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036, *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 21, 1995) (No. 95-991).

The question of federal law on which these courts differ is very important and, for that reason, Citibank supported the petition for certiorari in the *Smiley* case and filed its own petition for certiorari in the *Sherman* case.

Background

Citibank is a national banking association chartered by the OCC, a division of the Treasury Department. Citibank is located in Sioux Falls, South Dakota. It issues Visa, MasterCard, and other credit cards to customers nationwide, extends credit pursuant to the agreements covering such cards, and collects the charges that cardholders have contracted to pay. (*See* Pet. App. at 24-25.) Citibank's credit card agreements generally provide for both "finance charges" on certain outstanding balances and "late payment charges" if a cardholder does not make a required minimum payment by a specified date. (*Id.* at 28-29.)

On February 28, 1992, petitioner filed her complaint as a purported class action in the District Court, Denver County, State of Colorado, challenging Citibank's late payment charges. She alleged that she was a Colorado resident and that Citibank had assessed late payment charges on her VISA credit card account. (*Id.* at 24.) Such charges were consistent with the express terms of her card agreement with Citibank and were permitted under the law of South Dakota, Citibank's home state. Petitioner alleged, however, that such fees were impermissible under Colorado law. (*Id.* at 32-35.)

How the Federal Question Was Presented and Resolved Below

Petitioner's claim was predicated entirely on her contention that late payment charges assessed by Citibank on credit card accounts of Colorado residents violated Colorado law. (*Id.* at 35-39.) On September 18, 1992, Citibank moved the District Court for summary judgment as to all claims set forth in the Complaint. The basis for Citibank's motion was that, under section 85 of the National Bank Act, 12 U.S.C. § 85, Citibank is authorized to charge the "interest" allowed under the laws of its home state, South Dakota; that the term "interest" as used in section 85 includes Citibank's late payment charges; and that, as this Court held in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 308 (1978), section 85 preempts any conflicting state law.

On March 21, 1994, the District Court granted Citibank's motion. (Pet. App. at 9-22.) While petitioner's appeal to the Colorado Court of Appeals was pending, petitioner and Citibank jointly filed for a writ of certiorari to the Colorado Supreme Court. On January 30, 1995, the Colorado Supreme Court granted review (*id.* at 6-8), and on December 18, 1995, the Colorado Supreme Court affirmed the judgment of the District Court dismissing petitioner's claims (*id.* at 1-5).

The Colorado Supreme Court's decision rested on its recent opinion in *Copeland v. MBNA America Bank, N.A.*, 907 P.2d 87 (Colo.), *petition for cert. filed*, 64 U.S.L.W. 3469 (U.S. Dec. 28, 1995) (No. 95-1056). Based on a thorough review of the language, legislative history, purpose, and prior judicial and administrative interpretations of section 85, *id.* at 90-94, the court in *Copeland* had concluded that:

> as a matter of federal law, a late payment fee imposed on a customer's credit card account is a form of "interest" under section 85 of the NBA. [Therefore,] federal law authorized a national bank located in Delaware to assess a fifteen dollar late payment fee, allowed under Delaware law [the bank's home state], to the credit card account of a Colorado resident despite the fact that a Colorado consumer protection law prohibited such fees.

(Pet. App. at 4-5 (citing *Copeland*) (footnote omitted).) Consistently with *Copeland*, the Colorado Supreme Court concluded that "because Citibank is a national bank located in South Dakota, and South Dakota law permits the imposition of a late payment fee, Citibank can charge Richardson a late payment fee despite the fact that a Colorado consumer protection law prohibited such fees." (*Id.* at 5.)

ARGUMENT

I. THE SOLE QUESTION PRESENTED IS WHETHER "INTEREST," AS USED IN SECTION 85, INCLUDES CREDIT CARD LATE PAYMENT CHARGES.

The sole question properly presented for review in this case is whether "interest," as used in section 85, includes late payment fees on credit card accounts. If so, then any Colorado law purporting to impose conflicting limits on Citibank's late payment fees is preempted. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 318 n.31 (1978).

Petitioner has listed two other questions (questions 1 and 2 in the petition) that are not properly presented in this case. Contrary to the assumption in petitioner's first question, the Colorado Supreme Court did not hold that the term "interest" in section 85 includes late payment charges because the word "interest" is used that way in South Dakota law. Rather, the court unequivocally held that late payment fees are "interest" under section 85 "as a matter of federal law." (Pet. App. at 4.) For that reason, the assumption in petitioner's second question presented that the Colorado Supreme Court held that Congress delegated to South Dakota the power to define "interest" is also incorrect.

II. THE QUESTION PRESENTED IN THIS CASE IS ALREADY BEFORE THE COURT IN *SMILEY*.

There is no reason for the Court to grant this petition because the issue presented is before the Court in a pending case. *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (No. 95-860).

As petitioner acknowledges (Petition at 1), there is no relevant distinction between this case and *Smiley*. Each case involves a claim that Citibank's late payment charges were not permissible under the law of a plaintiff's home state (in *Smiley*, California law; in this case, Colorado law). In each case, Citibank sought judgment as a matter of law on the ground that section 85 of the National Bank Act, 12 U.S.C. § 85, which authorizes a national bank to charge "interest" to borrowers nationwide at the rates allowed by the bank's home state, *Marquette*, 439 U.S. at 308, preempted the state laws on which the claims were based. In each case, the state court granted Citibank's motion on the ground that "interest," as that term is used in section 85, includes late payment charges and, therefore, that the plaintiff's claims were preempted by

that statute. (Pet. App. at 5; *Smiley*, 11 Cal. 4th at 163-64, 900 P.2d at 707, 44 Cal. Rptr. 2d at 458.)

CONCLUSION

For the foregoing reasons, the petition should be held pending the Court's decision in *Smiley*, and then disposed of consistently with that decision.

Respectfully submitted,

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